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January 6, 1995

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in MM Docket No. 92-264

I am submitting the original and one copy of the attached memorandum summarizing my ex parte presentation on December 14, 1994 to Rebecca Dorch, Jim Olson, Jeffrey Lanning and another Commission staff member with respect to the petitions for reconsideration pending in Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992/Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions, MM Docket No. 92-264.

Sincerely,



Deborah C. Costlow

DCC/klh

Enclosures

cc: Rebecca Dorch

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MEMORANDUM

TO: William F. Caton
FROM: Deborah C. Costlow
DATE: January 6, 1995
RE: Ex Parte Presentation In MM Docket No. 92-264

I am submitting the original and one copy of this memorandum summarizing my ex parte presentation on December 14, 1994 to Rebecca Dorch, Jim Olson, Jeff Lanning and another Commission staff member with respect to the petitions for reconsideration pending in Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992/Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions, MM Docket No. 92-264. This meeting was held at the request of Ms. Dorch and I made my presentation on behalf of the National Private Cable Association ("NPCA"), which consists largely of SMATV operators.

The presentation focused primarily on the same arguments that were raised by NPCA in its petition for clarification or alternatively for reconsideration submitted in this docket on September 2, 1993. Current Commission rules in this area contravene the plain language of Section 11 since Congress intended to restrict only the manner in which cable television operators offer SMATV service, not the manner in which they acquire the rights and facilities necessary to provide such service. Moreover, current Commission rules have had an anticompetitive impact on the growth and development of SMATV systems, both in terms of discouraging investment in the SMATV industry and decreasing the overall market value of SMATV companies.

Overall competition within the video marketplace was also discussed. The anticompetitive impact of cable mandatory access statutes which afford eminent domain powers only to the franchised cable television industry cannot be gainsaid. Such laws allow franchised cable operators to override exclusive contracts entered into between video competitors and property owners of multiple

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William F. Caton
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dwelling units and manufactured housing parks while maintaining their own exclusive contracts. This results in a gradual erosion of the subscriber base of video competitors without a correlative opportunity of video competitors to compete for the subscriber base of the franchised cable operator. The following list of citations are those mandatory access statutes of which NPCA is aware:

New York (N.Y. Executive Law § 828); New Jersey (N.J. Rev. Stat. § 48:5A-49); Connecticut (Conn. Gen. Stat. § 16-333a); Pennsylvania (Penn. Stat. Ann. tit. 68, § 250.501-B et seq.); Minnesota (Minn. Stat. § 238.23); Illinois (65ILCS 5/11-42-11); Nevada (Nev. Rev. Stat. § 711.255); Kansas (Kan. Stat. Ann. § 58-2553); Wisconsin (Wisc. Stat. § 66.085); Maine (Me. Rev. Stat. Ann. tit. 14, § 6041); Delaware (Del. Code Ann. tit. 26, § 613); Rhode Island (R.I. Gen. Laws § 39-19-10); Washington, D.C. (D.C. Code Ann. §§ 43-1844, 1844.1).

Apart from such state or local mandatory access laws, the franchised cable industry continues to attempt to use Section 541(2)(2) of the Cable Act to force access to private property, including multiple dwelling units and manufactured housing parks. Thus far, federal circuit courts have rejected such attempts. See Century Southwest Cable Television, Inc. v. CIIF Assoc., No. 93-56725, slip op. (9th Cir. 1994); TCI of North Dakota, Inc. v. Schriock Holding Company, 11 F.3d 812, (8th Cir. 1993); Media General Cable v. Sequoyah, 991 F.2d 1169 (4th Cir. 1993); Cable Holdings of Georgia v. McNeil Real Estate Fund, 953 F.2d 600 (11th Cir. 1993) cert. denied 113 S. Ct. 182 (1992), reh'g, en banc, denied, 988 F.2d 1071 (1993); Cable Investments v. Woolley, 867 F.2d 151 (3d Cir. 1989).

While exclusive contracting is procompetitive, the practice of the franchised cable industry in entering into contracts with property owners of multiple dwelling units and manufactured housing parks containing a term lasting for the life of the franchise and all extensions and renewals, including the franchise as transferred to all successors and assigns, is extremely anticompetitive. The result of such contracts, often catching the property owner unaware, is to further entrench heretofore monopoly incumbent franchised cable operators. A contract term of 10 - 15 years is typically sufficient to allow the appropriate return on investment and yet preserve the benefits of "competition at the property line" for all players.